MOK HIN WAH & ORS.

v.

UNITED MALAYAN BANKING CORP. BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 490 OF 1986]
25 JUNE 1987

BANKING: *Overdraft facilities granted to customer/borrower - Loans were guaranteed - Notice - Demand notice sent to customer/borrower - Carbon copies of notice of demand sent to guarantors - Whether proper demand made from guarantors.*

This was a claim by the respondent for money lent to their customer, the 1st defendant in the Court below, from time to time under overdraft facilities and interest thereon. The loans were guaranteed under continuing guarantees and indemnities by the appellants for due payments of all money owing by the customer/borrower.

The main issue in this appeal is whether the notice sent by the respondent was a proper demand under the guarantees as all the guarantors received carbon copies of the notice of demand meant for the borrower.

Held:

[1] The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. It is not sufficient to send to the guarantors carbon copies of the notice of demand meant for the borrower.

[2] Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.

[3] The notice of demand was made only to the borrower and not to any of the 6 guarantors including the 4 appellants. The Court therefore held that no proper demand was made by the respondent from the appellants.

[Appeal allowed with costs.]

Cases referred to:

United Prime Corporation Berhad v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] CLJ (Rep) 1048

Bradford Old Bank Ltd. v. Sutcliffe [1918] 2 KB 833

Other sources referred to:

Paget's Law of Banking, 9th Edn., p. 522

For the appellants - James Puthucheary (Lambert Rasa Ratnam with him); M/s. Skrine & Co.
For the respondent - A.D. Rajah; M/s. Lovelace & Hastings

JUDGMENT

Salleh Abas LP:

We heard this appeal on 10 June 1987 and allowed it with costs. We now give out reasons for doing so.

This was a claim in the High Court Kuala Lumpur by UMBC, the plaintiff, for money lent to the first defendant from time to time under overdraft facilities and interest thereon. The loans were guaranteed under continuing guarantees and indemnities by the other five defendants for due payments of all money owing by the first defendant still remaining unpaid on the general balance of the first defendant's account with the plaintiff. The several guarantees and indemnities and their amounts are particularised at para. 4A & B of the statement of claim. When the defendants failed to pay the stated sum the plaintiff filed a writ and a statement of claim against them.

The main issue in this appeal is whether the notice sent by the plaintiff was a proper demand under the guarantees. It was conceded that all the guarantors received carbon copies of the notice of demand meant for the first defendant. The notice reads as follows:

> Please Take Notice that unless the total sum of RM307,458.57 (which was subsequently corrected to RM332,716.36: see p. 73) plus interest stated above is fully paid within Seven (7) days from the date hereof legal proceedings will be instituted against you **and your above guarantors** without further reference to you or to your above guarantors. (Emphasis added)

The notice of demand was therefore made only to the first defendant and not to any of the six guarantors including the four appellants. In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. Sending a carbon copy of it as in this case is not enough. It is also not sufficient to send carbon copies of the notice meant for the borrower as in the case of *United Prime Corporation Berhad v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors.* [1987] CLJ (Rep) 1048 with the words "This is a demand upon you" written against the names of the guarantors appearing at the bottom of the notice. The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under clause 1, the guarantors are to pay "on demand all money which now is or may during the continuance of the agreement be owing to you from the customer (s) ..." clause 4 requires the sum guaranteed or any balance thereof to be paid with interest from the date of demand for the payment thereof. It is also stipulated at clause 11 that any demand in relation to matters aforesaid may be effectively given or made by any officer of the bank, either served personally on the guarantors, or sent by post to or at their last known place of business. (see *Bradford Old Bank Ltd. v. Sutcliffe* [1918] 2 KB 833). Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor. (see Paget's *Law of Banking*, 9th Edn., 522).

For the above reasons, we hold that no proper demand was made by the respondent from the appellants, and accordingly allowed the appeal with costs.

Also found at [1987] 2 CLJ 197